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No. 82-310

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

SKIPPY, INC, *Petitioner*,

v.

CPC INTERNATIONAL, INC., *Respondent*.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I

Whether, following the granting of summary judgment striking all petitioner's claims for damages and leaving only injunctive relief for trial, there remained any issues before the trial court upon which petitioner was entitled to a trial by jury.

II

Whether the decision below, which does not rely on a waiver of trial by jury and which does not address or decide the issue of waiver, can be considered to be in conflict with decisions of other courts of appeals which specifically address waiver of trial by jury.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
COUNTER STATEMENT OF THE CASE	1
A. The Parties and Background Facts	1
B. The Complaint and Proceedings in the Trial Court	3
C. The Decision of the Court of Appeals	5
REASONS FOR DENYING THE WRIT OF CERTIORARI	6
ARGUMENT	7
I. FOLLOWING THE GRANTING OF SUMMARY JUDGMENT TO CPC, THERE REMAINED NO ISSUES IN THIS MATTER UPON WHICH PETITIONER WAS ENTITLED TO TRIAL BY JURY	7
A. Where There Are No Issues Of Fact In Dispute, The Defense Of Laches Is An Appropriate Subject For Summary Judgment	7
B. Fraud, When Used In Avoidance Of An Affirmative Defense To An Equitable Claim, Is Properly A Question For The Court And Does Not Entitle Petitioner To A Trial By Jury	8
C. The Claim For Damages For Fraud In The Procurement Of The Release Was Not Presented To The Trial Court	8
D. CPC's Counterclaim Is Not A Basis For Granting A Writ Of Certiorari	10
II. THE DECISION BELOW DOES NOT ADDRESS THE ISSUE OF WAIVER OF THE RIGHT TO A JURY TRIAL AND THEREFORE DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS ON THE WAIVER ISSUE	11
CONCLUSION	13
APPENDIX A	1a
APPENDIX B	15a
APPENDIX C	54a

TABLE OF AUTHORITIES

CASES:	Page
Brensinger v. *Margaret Ann Super Markets, Inc.*, 192 F.2d 458 (5th Cir. 1951)	7
Brown v. *County of Buena Vista*, 95 U.S. 157 (1877)	8
Commercial Iron & Metal Company v. *Bache Halsey Stuart, Inc.*, 581 F.2d 246 (10th Cir. 1978)	9
Costello v. *United States*, 365 U.S. 265 (1961)	8
Dam v. *General Electric Company*, 265 F.2d 612 (9th Cir. 1958)	7
Desert Palace, Inc. v. *Salisbury*, 401 F.2d 320 (7th Cir. 1968)	9
Hormel v. *Helvering*, 312 U.S. 552 (1941)	9
International Travelers Cheque Co. v. *BankAmerica Corporation*, 660 F.2d 215 (7th Cir. 1981)	9
Malbon v. *Pennsylvania Millers Mutual Insurance Company*, 636 F.2d 936 (4th Cir. 1980)	9
Monroe Auto Equipment Company v. *Heckethorn Mfg. & Supply Company*, 332 F.2d 406 (6th Cir.) *cert. denied* 379 U.S. 888 (1964)	11
New Hampshire Fire Insurance Company v. *Perkins*, 28 F.R.D. 588 (D.Del. 1961)	8
Plechner v. *Widener College, Inc.*, 569 F.2d 1250 (3d Cir. 1977)	8
Port of Palm Beach District v. *Goethals*, 104 F.2d 706 (5th Cir. 1939)	7
Singleton v. *Wulff*, 428 U.S. 106 (1976)	9
Skippy, Inc. v. *CPC International, Inc.*, 674 F.2d 209 (4th Cir. 1982)	4, 5
United States v. *One 1971 Mercedes Benz*, 542 F.2d 912 (4th Cir. 1976)	9
United States v. *243.22 Acres of Land*, 129 F.2d 678 (2d Cir.) *cert. denied* 317 U.S. 698 (1942)	11
United States v. *Williams*, 441 F.2d 637 (5th Cir. 1971)	11

Table of Authorities Continued

Page

STATUTES AND RULES:

Federal Rule of Civil Procedure 56 7

OTHER AUTHORITIES:

5 *Moore's Federal Practice* (2 ed. 1982) 8

9 Wright & Miller, *Federal Practice and Procedure:* Civil (1971) 8

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COUNTER STATEMENT OF CASE

A. The Parties And Background Facts

Respondent, CPC International, Inc. ("CPC") is the present owner of the trademark SKIPPY for peanut butter. CPC acquired its right to the mark SKIPPY in a 1958 merger with The Best Foods, Inc. Best Foods obtained the rights to the mark in 1954 when it acquired Rosefield Packing Company ("Rosefield"). Rosefield began marketing SKIPPY brand peanut butter in 1933, and in 1947, was granted, without opposition, a federal registration for the mark SKIPPY for peanut butter.

Petitioner, Skippy, Inc., claims to be the owner of the trademark "Skippy" for a humorous juvenile cartoon character created by Percy L. Crosby in 1923 and syndicated to newspapers as a comic strip. In 1925, Crosby

obtained a federal trademark for the mark "Skippy" for the title of a cartoon character. In 1945 syndication of the "Skippy" comic strip terminated and "Skippy" ceased to exist as a syndicated juvenile comic character.[1] The federal registration of the "Skippy" mark for cartoons expired in 1945 (JA 378).

From 1945 to the commencement of the suit below, Skippy, Inc. produced no cartoons, manufactured no product and performed no services utilizing a "Skippy" trademark. In contrast, from 1958 to 1979, net sales by CPC of SKIPPY peanut butter totalled $1,218,000,000 (JA 301). Marketing and advertising expenses during the same period totalled $105,700,000 (JA 302).

From 1933 until the instant litigation, petitioner did nothing to enjoin Rosefield's or its successors' continued and open use of the name SKIPPY for peanut butter.

After Mr. Crosby's death in 1964, management of Skippy, Inc. changed hands and in 1968 his daughter, Joan Crosby Tibbetts, was elected President. In 1977 she began negotiations with CPC to settle any "claims" that Skippy, Inc. might have against CPC, which resulted in an agreement signed in January, 1978, whereby, *inter alia*, CPC paid Skippy, Inc. $25,000.00, and Skippy, Inc. released CPC from all differences and controversies relating to the use of the mark SKIPPY.

On March 14, 1980, 47 years after CPC's predecessor first began use of the mark SKIPPY for peanut butter, the petitioner, Skippy, Inc., filed this action against CPC.

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[1] Pet. App. B at 20a; JA 378, 385. JA refers to the Joint Appendix filed by the parties on appeal.

B. The Complaint And Proceedings In The Trial Court

Petitioner's complaint[2] sought damages for trademark infringement and unfair competition, together with injunctive relief preventing CPC's future use of SKIPPY on peanut butter. Petitioner's complaint also sought an order requiring the Commissioner of Patents and Trademarks to cancel CPC's registration of its SKIPPY trademark. CPC's answer raised several affirmative defenses, including laches and the bar of the release. In addition, CPC filed a counterclaim seeking a declaratory judgment that Skippy, Inc. had abandoned its rights in the trademark SKIPPY, that CPC's right to use the trademark SKIPPY had become incontestable, and seeking return of the $25,000 consideration for the release.

CPC filed a motion for summary judgment on the grounds of laches and estoppel as to petitioner's claim for damages and injunctive relief. On June 24, 1980, summary judgment was granted to CPC on all damage claims raised by the complaint on the basis that petitioner's 47-year delay in bringing this action constituted laches (JA 42). The court accordingly scheduled the matter for trial by the court, stating, "[t]here isn't anything left in the case but injunctive relief requested, and that is not appropriate for a jury."[3]

Following the summary judgment ruling, petitioner filed a motion for reconsideration on the basis that the court's ruling extended only to trademark damages and

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[2] Resp. App. A at 1a.

[3] Transcript of Proceedings, June 24, 1980, at 35-36, reprinted in Supplemental Appendix on Appeal at 35-36.

not to damages for unfair competition.[4] The motion for reconsideration was denied.

On August 13 and 14, 1980, the case was tried without a jury before the Honorable Oren R. Lewis. On the day before trial, petitioner filed its proposed findings of fact and conclusions of law in accordance with the Local Rules of Practice.[5] The trial court denied petitioner's claim for injunctive relief on the grounds that there was no infringement of petitioner's "Skippy" trademark by CPC's predecessor, and that petitioner's failure to protect its claimed exclusive right to "Skippy" for 47 years, together with the millions of dollars spent to advertise and promote SKIPPY peanut butter, constituted laches coupled with estoppel, sufficient to bar petitioner's claim for an injunction.[6] Further, the court ruled that the release executed by Skippy, Inc. in January, 1978 barred peti-

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[4] Nowhere in that motion or in its original opposition to the summary judgment motion did petitioner raise the claims first asserted on appeal that it was seeking damages for the period following the filing of the suit or advise the court that it intended to seek damages against CPC for fraudulent procurement of the release. The first time petitioner raised the issue of whether laches bars damages accruing after the filing of suit is in this Court; the first time that petitioner raised a claim for damages for fraudulent procurement of the release was before the court of appeals. *Skippy, Inc. v. CPC International, Inc.*, 674 F.2d 209, 214 (4th Cir. 1982).

[5] Resp. App. B at 15a. This voluminous, 168-paragraph submission contained no reference to any claim for damages for fraud in the procurement of the release, and contained no reference to any claim for damages for acts of infringement occurring after the filing of the complaint.

[6] Although not addressed by the court of appeals, these grounds provided an adequate basis for denial of injunctive relief without reaching the defense of release, the only issue on the basis of which petitioner alleges it was denied a jury trial.

tioner's claim for relief, stating "[t]heir [petitioner's] claim that the release was obtained by fraud or trickery lacks both evidentiary and legal support."[7]

As respondent had abandoned, prior to trial, the portion of the counterclaim seeking return of the $25,000 consideration for the release[8] and introduced no evidence on this claim at trial, the trial court denied recovery on this claim "for want of sufficient proof."[9]

C. The Decision Of The Court Of Appeals

On appeal, the court below affirmed the trial court's summary judgment ruling which dismissed all petitioner's damage claims on the basis of laches. Moreover, with the exception of the decision regarding the incontestability of CPC's right to use the mark SKIPPY, the court of appeals affirmed the "resolution of all issues by the district court."[10]

The court of appeals addressed petitioner's Seventh Amendment claims and found no error in the trial court's proceedings. Instead, the court of appeals found that the issues upon which petitioner now claims it was denied its right to jury trial were not presented at the trial court level and could not be raised for the first time on appeal. See n. 4, *supra*.

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[7] Pet. App. B at 21a-22a.

[8] The abandonment of respondent's claim is evidenced by the absence of any reference to the claim in respondent's proposed findings of fact and conclusions of law filed with the court on the day prior to trial. See Resp. App. C at 54a.

[9] Pet. App. B at 24a.

[10] *Skippy, Inc.* v. *CPC International, Inc.*, 674 F.2d 209, 216 (4th Cir. 1982).

The court of appeals did not address or rule upon the waiver of petitioner's right to a jury trial as asserted in the present petition.

REASONS FOR DENYING THE WRIT OF CERTIORARI

This is not a case which turned on the trial court's denial of petitioner's right to a jury, nor is it a waiver case. What this case does present is an attempt by petitioner to have appellate courts reverse the decision of the trial court on grounds not contemplated before or at trial. A jury was duly demanded, but thereafter all jury issues were dismissed by summary judgment prior to trial. The case was then tried without a jury, since all petitioner's remaining claims and defendant's affirmative defenses, as well as the allegations of fraud made by petitioner, were related to its claims for injunctive relief.

The claims for damages upon which petitioner now alleges it was entitled to a jury trial were not raised at the trial court, and therefore were properly dismissed by the court of appeals as untimely.

Thus, the bases upon which petitioner seeks a writ of *certiorari* in this Court are illusory, and do not warrant review by this Court for the following reasons: (1) the granting of summary judgment disposed of all jury-triable issues, and (2) the jury-triable claims later raised by petitioner were not before the trial court and were therefore untimely. It was on this basis, and not waiver, that the decision of the court of appeals rested.

Further, the facts and issues in this case are unique and unlikely to be encountered with any similarity in a subsequent case. The legal issues herein are integrally related to the facts presented and are accordingly of no general interest and no controlling importance.

I.

FOLLOWING THE GRANTING OF SUMMARY JUDGMENT TO CPC, THERE REMAINED NO ISSUES IN THIS MATTER UPON WHICH PETITIONER WAS ENTITLED TO TRIAL BY JURY

A. Where There Are No Issues Of Fact In Dispute, The Defense Of Laches Is An Appropriate Subject For Summary Judgment

Prior to trial, the court granted partial summary judgment, dismissing petitioner's claims for damages on the basis of laches, leaving only equitable claims for relief to be resolved at trial. Although petitioner argued in the court of appeals that Judge Bryan's granting of summary judgment on the basis of laches was error, the court of appeals disagreed, affirming the ruling. Petitioner does not assign the granting of partial summary judgment as a basis for granting *certiorari*, but rather argues that the trial court was in error in finding as a matter of law that the undisputed evidence of petitioner's unexcused 47-year delay in bringing this claim constituted laches so as to bar petitioner's right to damages.

Laches, like any affirmative defense where the underlying facts are undisputed, is an appropriate matter for decision by summary judgment under Rule 56 of the Federal Rules of Civil Procedure.[11] Moreover, the granting of summary judgment where the facts are uncontested does not infringe petitioner's Seventh Amendment right to a jury trial. *Port of Palm Beach District* v. *Goethals*, 104 F.2d 706, 709 (5th Cir. 1939). The evidence was undisputed that petitioner knew of the use of SKIP-

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[11] *Brensinger* v. *Margaret Ann Super Markets, Inc.*, 192 F.2d 458 (5th Cir. 1951); *Dam* v. *General Electric Company*, 265 F.2d 612 (9th Cir. 1958).

PY for peanut butter for 47 years before it sought to enforce its rights. Therefore, a finding of laches as a matter of law was appropriate and did not require jury resolution.[12]

B. Fraud, When Used In Avoidance Of An Affirmative Defense To An Equitable Claim, Is Properly A Question For The Court And Does Not Entitle Petitioner To A Trial By Jury

Petitioner further asserts that, since fraud was an issue in this case, it was entitled to a jury trial. However, a claim of fraud is in itself neither legal nor equitable. Where, as here, the fraud issue relates solely to claims for injunctive relief, which are equitable in nature, no right to a jury trial attaches.[13] At trial, fraud was asserted by petitioner as a bar to respondent's defense of release. This use of fraud, in the context of an injunction claim, created no jury trial right.[14]

C. The Claim For Damages For Fraud In The Procurement Of The Release Was Not Presented To The Trial Court

Petitioner alleges that it was denied its right to a jury trial on its claim for damages for fraud in the procurement

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[12] As this Court stated in *Costello* v. *United States*, 365 U.S. 265, 282 (1961), quoting *Brown* v. *County of Buena Vista*, 95 U.S. 157, 161 (1877), "[t]he law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof."

[13] *Plechner* v. *Widener College, Inc.*, 569 F.2d 1250 (3d Cir. 1977); *New Hampshire Fire Insurance Company* v. *Perkins*, 28 F.R.D. 588 (D.Del. 1961); 9 Wright & Miller, *Federal Practice and Procedure:* Civil § 2311 at 52 (1971); 5 *Moore's Federal Practice* § 38.20 (2 ed. 1982).

[14] *Id.*

of the release. The court of appeals disagreed on the grounds that petitioner had failed to raise any claim for damages for fraudulent procurement of the release in the trial court, nor was such a claim to be found in petitioner's complaint.[15]

A review of (1) the complaint,[16] (2) petitioner's opposition to CPC's first motion for summary judgment, (3) petitioner's motion for reconsideration filed after the granting of partial summary judgment, and (4) petitioner's proposed findings of fact and conclusions of law filed on the day before trial,[17] clearly supports the court of appeals' ruling that this claim was not contemplated by petitioner during the proceedings in the district court.

The court of appeals relied on the universally accepted doctrine that in the absence of exceptional circumstances, questions not raised and properly preserved in the trial forum will not be noticed on appeal. *Malbon* v. *Pennsylvania Millers Mutual Insurance Company*, 636 F.2d 936, 941 (4th Cir. 1980).[18] As this Court stated in *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941), this is

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[15] Petitioner also alleges that it was denied its right to a jury trial on its claim for damages for infringement occurring after the filing of the complaint. This claim is raised for the first time in this Court. Like petitioner's claim for fraud in the procurement of the release, this claim must also be disregarded as it was not raised and properly preserved in the trial court. See n. 4, 5, *supra*.

[16] Resp. App. A at 1a.

[17] Resp. App. B at 15a.

[18] *See also Singleton* v. *Wulff*, 428 U.S. 106 (1976). The various circuits have adopted the rule set forth above. *See, International Travelers Cheque Co.* v. *BankAmerica Corporation*, 660 F.2d 215 (7th Cir. 1981); *United States* v. *One 1971 Mercedes Benz*, 542 F.2d 912 (4th Cir. 1976); *Commercial Iron & Metal Company* v. *Bache Halsey Stuart, Inc.*, 581 F.2d 246 (10th Cir. 1978); *Desert Palace, Inc.* v. *Salisbury*, 401 F.2d 320 (7th Cir. 1968).

> . . . essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Clearly, this rule is applicable where not only an issue, but rather an entire cause of action was not raised in any manner by either the pleadings or the evidence, at either the trial or appellate level. The court of appeals having found no exceptional circumstances in this case to depart from the rule, petitioner was not denied its right to a jury trial on untimely claims. It is inappropriate for the petitioner to now assert that this Court should grant *certiorari* and reverse the decisions of the district court and the court of appeals on the basis of claims which were not raised or contemplated by the petitioner during the proceedings below.

D. CPC's Counterclaim Is Not A Basis For Granting A Writ Of Certiorari.

Petitioner makes a final attempt to convince this Court that it was denied its right to a jury trial by raising the issue of CPC's counterclaim which included a demand for return of the $25,000 paid to Skippy, Inc. in consideration for the release. However, this demand was abandoned at the outset of trial and no evidence was introduced at trial in support of this claim nor was any argument made thereon.[19]

Even if the counterclaim as a whole remained in the case, the absence of any evidence in support of this aspect of CPC's counterclaim would have required the trial

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[19] Resp. App. C at 54a; See n. 8, *supra*.

court, were a jury impaneled on this issue, to direct a verdict against CPC at the close of the case. Thus, it would not have been reversible error to try this issue without a jury. As the Sixth Circuit recognized:

> The prevailing, and we think the more logical view, is that denial of a jury trial is not reversible error if the court could have directed a verdict, and there was no evidence to go to the jury.

Monroe Auto Equipment Company v. *Heckethorn Mfg. & Supply Company*, 332 F.2d 406, 412 (6th Cir.) *cert. denied* 379 U.S. 888 (1964).[20] The mere existence of this counterclaim, decided ultimately in favor of the petitioner and not appealed by CPC,[21] is not a basis for the granting of *certiorari* or for reversal of the decisions of the trial and appellate courts.

II.

THE DECISION BELOW DOES NOT ADDRESS THE ISSUE OF WAIVER OF THE RIGHT TO A JURY TRIAL AND THEREFORE DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS ON THE WAIVER ISSUE

Petitioner alleges the court of appeals' decision is in conflict with other circuits on the issue of waiver of the

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[20] *See United States* v. *Williams*, 441 F.2d 637, 644 (5th Cir. 1971) (this court does not demand jury consideration of an issue which is determinable by directed verdict); *United States* v. *243.22 Acres of Land*, 129 F.2d 678, 684 (2d Cir.) *cert. denied* 317 U.S. 698 (1942) (no constitutional right to have twelve men sit idle and functionless in a jury-box).

[21] The counterclaim was decided adversely to CPC. That decision was not appealed and is now *res judicata*. Thus, if this Court granted *certiorari* and reversed and remanded, there could be no new trial on this counterclaim.

right to jury trial. Whatever the conflict among the circuits on the question of waiver, it has no bearing on this case. The court of appeals did not address or decide that petitioner had "waived" its right to a jury trial. Rather, as stated previously, in affirming the ruling of the trial court, the court of appeals ruled that no issues remained at trial entitling petitioner to a trial by jury. Further, with respect to those claims raised for the first time on appeal, the court of appeals ruled that claims not made and preserved in the trial court could not be the basis for a new trial.

Accordingly, petitioner's discussion of the rulings in the various circuits on the issue of waiver of jury trial is irrelevant. The court of appeals' decision neither agrees nor conflicts with other circuits' rulings on the issue of waiver of right to jury trial. In its opinion, the court of appeals did not address the actions or inaction upon which a party could be deemed to have "waived" his right to a trial by jury. Petitioner's attempt to create a facially "certworthy" issue by manufacturing a conflict in this case must fail. In short, all jury-triable issues presented in the complaint were dismissed by summary judgment. All other jury entitlement claims raised by petitioner on appeal must fail because they were not before the trial court and therefore are untimely in their assertion.

CONCLUSION

The rulings of the district court and the court of appeals are firmly grounded upon sound application of the law to the facts and issues introduced in evidence. The claims of petitioner and the defenses of respondent were given careful scrutiny by both courts below. These rulings do not require review or reversal by this Court. The opinion of the court of appeals does not raise matters which are of such controlling importance or are conflicting with the rulings in other circuits so as to warrant a writ of *certiorari* by this Court. For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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